

TAB 3

Part 1 of 2

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 BEAUMONT DIVISION

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

4 FINISAR CORPORATION) CIVIL ACTION NO. JUL 12 2006
5) 1:05-CV-00264 DAVID J. MALAND, CLERK
6 PLAINTIFF,) BEAUMONT, TEXAS DEPUTY *kd*
7 VS.) JULY 6, 2006
8 DIRECTV GROUP, INC., ET) 9:30 A.M.
9 AL)
10 DEFENDANTS.)

10 TRANSCRIPT OF HEARING
11 BEFORE THE HONORABLE JUDGE RON CLARK
12 UNITED STATES DISTRICT JUDGE

13 APPEARANCES:

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8 PROCEEDINGS RECORDED BY STENOGRAPH SHORTHAND; TRANSCRIPT
9 PRODUCED BY CAT SYSTEM.

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1 THE COURT: PLEASE BE SEATED. ALL RIGHT. I
2 CALL THE FINISAR CORPORATION VERSUS DIRECTV GROUP, INC., ET AL,
3 NO. 1:05-CV-0264. WE'RE HERE ON THE POST-TRIAL MOTIONS AFTER
4 THE JURY HAS RETURNED A VERDICT. AND IS PLAINTIFF READY?

5 MR. ROBERTS: YES, YOUR HONOR.

6 THE COURT: AND IS DEFENDANT READY?

7 MR. SAVIKAS: YES, YOUR HONOR.

8 THE COURT: OKAY. I HAVE RECEIVED THE VARIOUS
9 BRIEFS THAT -- AND PAPERS THAT HAVE BEEN FILED IN CONNECTION
10 WITH THIS. THERE'S A NUMBER OF DIFFERENT ISSUES TO BE TAKEN
11 UP, THE VARIOUS JUDGMENTS AS A MATTER OF LAW, THE QUESTION OF
12 ENHANCEMENT, THE QUESTION OF WHETHER OR NOT THE CASE IS
13 EXCEPTIONAL, WHETHER ATTORNEYS SHOULD BE AWARDED, AND IF SO,
14 HOW MUCH. THE QUESTION OF WHETHER OR NOT INJUNCTION SHOULD BE
15 ISSUED, AND IF NOT, HOW A COMPULSORY LICENSE OR OTHER
16 ALTERNATIVE MIGHT BE STRUCTURED; AND THEN FINALLY, THE MATTER
17 OF HOW TO CALCULATE PREJUDGMENT INTEREST. A LOT TO COVER.
18 SOME OF THOSE THINGS WERE PRETTY WELL COVERED, I THINK, IN THE
19 TESTIMONY AT TRIAL, WHICH THE COURT CAN MOSTLY STILL REMEMBER,
20 WHICH IS IN THE RECORD, OF COURSE.

21 SO, PLAINTIFF, YOU CAN GO AHEAD AND PRESENT AS
22 TO WHAT YOU THINK IS MOST IMPORTANT. THERE IS A LIMIT, BUT, OF
23 COURSE, THAT'S SIMILAR TO WHAT YOU'D SEE IN AN APPELLATE COURT.
24 YOU'RE GOING TO HAVE TO PICK THE ISSUES YOU THINK ARE STILL
25 OPEN OR NEED SOME ELUCIDATION.

1 MR. ROBERTS: YOUR HONOR, AT THE TOP OF OUR
2 LIST, OF COURSE, IS THE INJUNCTION. I'D LIKE TO START BY JUST
3 DISCUSSING BRIEFLY THE EBAY CASE. I WAS SURPRISED WHEN I
4 FINALLY READ THE EBAY CASE BECAUSE IN THE NEWS REPORTS IT
5 SOUNDED LIKE EBAY HAD WON. AND WHEN I READ THE CASE, I
6 REALIZED THAT NEITHER PARTY HAD WON. IN FACT, WHEN YOU READ
7 THAT SUPREME COURT OPINION, YOU REALIZE THAT THE EBAY CASE IS
8 REALLY A REBUKE OF THE DISTRICT COURT'S ACTION AS MUCH AS IT
9 WAS A REBUKE OF THE FEDERAL CIRCUIT'S ACTION.

10 AND IN THAT CASE THE SAME ARGUMENTS ARE BEING
11 MADE HERE THAT ARE MADE HERE. AND THAT IS IN A SITUATION WHERE
12 THE PLAINTIFF EXPRESSES A WILLINGNESS TO LICENSE ITS PATENTS
13 AND THE PLAINTIFF HAS A LACK OF COMMERCIAL ACTIVITY IN
14 PRACTICING THOSE PATENTS, THE DISTRICT COURT FOUND A
15 CATEGORICAL APPROACH THAT AN INJUNCTION SHOULD NOT ISSUE. AND
16 THE SUPREME COURT TURNED THAT AROUND AND SAID THAT CATEGORICAL
17 RULE CANNOT BE SQUARE TO THE PRIOR SUPREME COURT DECISION, SUCH
18 AS THE CONTINENTAL PAPER BAG DECISION.

19 NOW, THE POINT TO BE TAKEN BY THE EBAY DECISION
20 IS THAT IS NOT MEANT TO BE A RADICAL DEPARTURE FROM PRIOR
21 PRACTICE. IN FACT, THE SUPREME COURT REALLY EMPHASIZED THAT A
22 PAGE OF HISTORY IS WORTH A VOLUME OF LOGIC. AND JUSTICE
23 ROBERTS NOTED THAT THE LONG TRADITION OF EQUITY PRACTICE IS NOT
24 SURPRISING GIVEN THE DIFFICULTY OF PROTECTING A RIGHT TO
25 EXCLUDE THROUGH MONETARY REMEDIES THAT ALLOW AN INFRINGER TO

1 USE AN INVENTION AGAINST THE PATENTEE'S WISHES.

2 SO, YOUR HONOR, WHAT WE'RE FACED WITH HERE IS AN
3 APPROXIMATE 200-YEAR HISTORY WHERE IN THE VAST MAJORITY OF THE
4 CASES, AN INJUNCTION IS ENTERED FOLLOWING A VERDICT SUCH AS IN
5 THE SITUATION OF OURS WHERE INFRINGEMENT IS FOUND, THE
6 APPROPRIATE REMEDY GOING FORWARD TO PROTECT THAT RIGHT TO
7 EXCLUDE IS AN INJUNCTION. AND THAT'S WHAT WE WOULD ASK THE
8 COURT TO ENTER HERE TODAY.

9 NOW, I KNOW THE COURT HAS PREVIOUSLY EXPRESSED
10 ITS PRELIMINARY VIEW, I HOPE, THAT AN INJUNCTION IS NOT
11 APPROPRIATE IN THIS CASE, BUT I'D JUST ASK THE COURT TO
12 RECONSIDER THAT VIEW --

13 THE COURT: WELL, KEEP IN MIND WHAT I POINTED
14 OUT WAS IS ON TWO OF THE FOUR POINTS TO BE CONSIDERED THAT
15 THERE WAS ALREADY VERY STRONG EVIDENCE IN THE RECORD. I MEAN,
16 THAT WAS JUST A FACT AS TO WHAT EVIDENCE THERE ALREADY WAS.
17 AND THAT WAS MAINLY TO ASSIST COUNSEL ON BOTH SIDES IN USING
18 THE LIMITED TIME THEY HAVE TO FOCUS ON HOW TO DEAL WITH THAT.
19 I MEAN, THERE'S NO POINT IN IGNORING THE VERY DIRECT TESTIMONY
20 THAT'S ALREADY THERE, AND THAT WOULD BE AS TO WASTE EVERYBODY'S
21 TIME. SO, IN TERMS OF VIEW OR NOT VIEW, IT IS -- IT WAS A
22 STATEMENT OF WHAT I SAW AS THE FACTS ALREADY IN THE RECORD ON
23 TWO OF, I THINK, FOUR MAJOR ISSUES FOR THE COURT TO CONSIDER.
24 AND OBVIOUSLY IF THERE WAS SOMETHING I MISSED IN THE RECORD,
25 THIS ALLOWED COUNSEL ON BOTH SIDES TO DIRECT MY ATTENTION TO

1 THE RECORD WHERE MAYBE I HAD MISSED SOMETHING OR TO PRESENT
2 DIFFERENT EVIDENCE.

3 MR. ROBERTS: THANK YOU. THE POINT I WOULD LIKE
4 TO MAKE ON THESE FACTORS IS, FIRST OF ALL, IF WE WERE A
5 COMPETITOR OF DIRECTV STANDING HERE TODAY, I DON'T THINK THERE
6 WOULD BE ANY QUESTION THAT WE WERE ENTITLED TO AN INJUNCTION.

7 NOW, THE FACT THAT WE'RE NOT A COMPETITOR DOES
8 NOT CHANGE THE ANALYSIS BECAUSE WE ARE -- HAVING FAILED TO
9 LICENSE THE PATENT, WE ARE IN A POSITION TO ENABLE A COMPETITOR
10 TO BE IN THAT POSITION OF BEING ABLE TO EXCLUDE DIRECTV.
11 WE -- AS WE POINTED OUT IN OUR BRIEF, WE COULD GO OUT AND
12 LICENSE THE PATENT TODAY ON AN EXCLUSIVE BASIS TO SOMEONE, AND
13 WHAT WE OFFER THEM IS THE RIGHT TO KEEP OTHERS OUT OF THE
14 INDUSTRY. AND BECAUSE WE ARE UNLIKE SOME OF THESE OTHER
15 COMPANIES THAT ALREADY HAVE A HISTORY OF LICENSING ON A
16 NON-EXCLUSIVE BASIS, IF THE COURT WERE TO IMPOSE A COMPULSORY
17 LICENSE ON US, THE COURT IS, IN EFFECT, TAKING AWAY FROM US THE
18 ABILITY TO EXCLUDE THAT COMES WITH THE PATENTS. AND WE HAVEN'T
19 VOLUNTARILY SURRENDERED THAT BY ENTERING INTO A LICENSED
20 PROGRAM WITH A DOZEN OTHER COMPANIES. THIS IS NOT A CASE WHERE
21 WE'RE LICENSING WIDGETS FOR ABOUT \$1.32 EACH, AND THE ONLY
22 THING WE'RE MISSING OUT ON IS SOME LICENSING ROYALTY. WE
23 COULD -- WE COULD GO KNOCK ON DIRECTV'S MAJOR COMPETITOR'S DOOR
24 TOMORROW, OFFER THEM TO SELL THIS PATENT, OFFER TO LICENSE THIS
25 PATENT ON AN EXCLUSIVE BASIS AND PUT THEM IN THE VERY SHOES

1 THAT WE OCCUPY TODAY. AND IT IS THAT POSITION THAT THE COURT
2 WOULD BE TAKING AWAY FROM US BY REQUIRING US TO LICENSE THIS
3 PATENT ON A COMPULSORY BASIS.

4 WHAT SHOULD HAPPEN HERE IS AN INJUNCTION SHOULD
5 BE ENTERED. THAT GIVES DIRECTV SOME OPTION. THEY CAN EITHER
6 DECIDE TO PULL THE PLUG ON THE WHOLE SYSTEM; THEY CAN NEGOTIATE
7 WITH US FOR A ROYALTY; OR, THEY CAN IMPLEMENT ONE OF THE
8 INEXPENSIVE NONINFRINGEMENT ALTERNATIVES THAT THEY HAVE TESTIFIED
9 AND MAINTAINED EXIST THROUGHOUT THE PENDENCY OF THIS CASE.
10 NOW, THAT IS EXACTLY THE SITUATION THAT WE SAW IN A RECENT VERY
11 FAMOUS CASE OF NTP VERSUS RESEARCH IN MOTION. NOW -- AND THE
12 POINT I WANT TO MAKE WITH THAT CASE IS THAT THERE THE JURY CAME
13 BACK WITH A VERDICT OF \$23 MILLION. SOME YEARS LATER WHEN THE
14 INJUNCTION WAS FINALLY ENTERED WHEN THE JUDGE SAYS, YOU KNOW, I
15 SEE NO REASON NOT TO ENTER THE INJUNCTION. IT'S GOING TO
16 ENTER, AND WE SAW PRESS RELEASES ABOUT THAT. WE SAW GOVERNMENT
17 INTERVENING. FINALLY THERE WAS A SETTLEMENT. AND WHAT BECAME
18 THE REALITY THROUGH THAT SETTLEMENT IS THAT RIM HAD NO
19 NONINFRINGEMENT ALTERNATIVES. THEY WERE UNWILLING TO PULL THE
20 PLUG, AND SO THEY PAID THE MONEY TO GET THE LICENSE.

21 NOW, IN THAT CIRCUMSTANCES THE MARKET DETERMINED
22 WHAT THAT LICENSE SHOULD BE. THAT WAS AN ACTUAL NEGOTIATION
23 BETWEEN TWO PARTIES. AND IN THIS CASE IF WE'RE TRYING TO
24 SIMULATE THAT MARKET RESPONSE WITH SOME SORT OF AN ONGOING
25 ROYALTY OR SOMETHING ELSE, IT'S A VIRTUAL IMPOSSIBILITY.

1 NOW, I WOULD REFER THE COURT TO THE IN RE
2 MAHURKAR CASE. THE IN RE MAHURKAR CASE IS A NORTHERN DISTRICT
3 OF ILLINOIS CASE, BUT WHAT'S INTERESTING ABOUT THAT CASE IS
4 THAT IT WAS DECIDED BY JUDGE EASTERBROOK, WHO IS ONE OF THE
5 FOREMOST ADVOCATES OF LAW ECONOMICS. HE SITS ON THE 7TH
6 CIRCUIT. AND IN THAT CASE JUDGE EASTERBROOK NOTED: THE
7 INJUNCTION CREATES A PROPERTY RIGHT AND LEADS TO NEGOTIATIONS
8 BETWEEN THE PARTIES. A PRIVATE OUTCOME OF THESE NEGOTIATIONS
9 WHETHER THEY END IN A LICENSE AT A PARTICULAR ROYALTY OR IN THE
10 EXCLUSION OF AN INFRINGER FROM THE MARKET IS MUCH PREFERABLE TO
11 A JUDICIAL GUESSTIMATE ABOUT WHAT A ROYALTY SHOULD BE.

12 SO WE'RE IN A POSITION HERE TODAY OF SAYING IF
13 AN INJUNCTION IS NOT GOING TO ENTER, WHAT DO WE DO ABOUT THAT
14 REMEDY? IF THE REMEDY FOR THE VIOLATION OF THE RIGHT TO
15 EXCLUDE IS NOT AN INJUNCTION, HOW DO WE CALCULATE THE VALUE OF
16 WHAT THAT INJUNCTION WOULD BE? THAT'S A VIRTUAL IMPOSSIBILITY.
17 WE CAN'T LOOK AT THE JURY'S VERDICT. THE JURY VERDICT IS FOR
18 DETERMINING PAST ROYALTIES. WE HAVE TO RELY ON THE MARKET TO
19 MAKE THAT DECISION.

20 NOW IN THIS CASE THERE, IS NO ESTABLISHED
21 ROYALTY FOR THIS PATENT. AND THAT'S THE PROBLEM IS WE ARE NOT
22 SELLING WIDGETS AT \$1.32 PER WIDGET OR LICENSING OUT OUR PATENT
23 TO OTHERS WHO SELL WIDGETS FOR \$1.32. SO THERE IS -- THERE IS
24 NO WAY TO APPROXIMATE WHAT THIS INJUNCTION WOULD BE WORTH TO
25 US. AND THAT'S WHY WE SAY THE MARKET HAS TO -- HAS TO

1 DETERMINE THE VALUE OF THAT. BY ENTERING THE INJUNCTION,
2 LETTING THESE FACTORS PLAY OUT.

3 NOW, THE OTHER PROBLEM THAT COMES UP, THE
4 SUGGESTION HAS BEEN MADE THAT THIS IS REALLY NO DIFFERENT THAN
5 THE Z4-CASE, AND WE SHOULD JUST FOLLOW WHAT JUDGE DAVIS DID
6 AND -- AND HAVE ANOTHER TRIAL OR ANOTHER ACTION TO DETERMINE
7 FUTURE DAMAGES AND JUST LET THEM GO ON WITH BUSINESS AS USUAL.
8 THERE ARE FEW DISTINCTIONS HERE. IN THE Z4-CASE, MICROSOFT HAD
9 ALREADY SET FORTH A PLAN FOR DISCONTINUING THE USE OF THE
10 PATENTED INVENTION. THE OTHER -- SO, IN EFFECT, THERE IS AN
11 INJUNCTION IN PLACE, A VOLUNTARY ONE BEING ADOPTED BY
12 MICROSOFT. AND WHAT THEY'RE SAYING WAS, YOU KNOW, WE CAN'T DO
13 THIS TOMORROW, BUT HERE IS OUR PLAN. WE'RE GOING TO TAKE THIS
14 OUT OF OUR NEW RELEASE OF WINDOWS IN 2007, WE'RE GOING TO PHASE
15 THIS OUT OF CURRENT PRODUCTS. AND I THINK THAT THAT -- EXCUSE
16 ME, THE PLAN WAS WITHIN TWO OR THREE YEARS ALL INFRINGING RULES
17 WOULD CHANGE, AND THE VAST MAJORITY OF THAT WOULD STOP WITHIN
18 SEVEN MONTHS. THAT'S ONE DISTINCTION.

19 THE SECOND DISTINCTION WAS IN MICROSOFT -- IN
20 THE Z4 MICROSOFT CASE, THE PATENT WAS TO A RELATIVELY MINOR
21 SOFTWARE MODULE, AND WHAT Z4 WAS ASKING WAS THAT MICROSOFT BE
22 ENJOINED FROM SELLING ITS MICROSOFT OFFICE SUITE OF PRODUCTS
23 AND ITS OPERATING SYSTEM, THE WINDOWS OPERATING SYSTEM. SO
24 THEY WOULD HAVE THE VERY CONCERNED ADDRESSED BY THE SUPREME
25 COURT THAT YOU'VE GOT A PATENT ON A SMALL COMPONENT AND YOU'RE

1 ASKING THEM TO ENJOIN THE ENTIRE SYSTEM. THAT IS NOT OUR CASE.
2 OUR PATENT AS WE'VE SEEN OVER THE TWO WEEKS OF TRIAL COVERS THE
3 ENTIRE SYSTEM. SO WE'RE DISTINGUISHABLE ON THAT BASIS AS WELL.

4 HERE, IF WE'RE TO ADOPT JUDGE DAVIS'S
5 APPROACH -- BECAUSE THERE HAS BEEN NO EXPRESSION OF ANY PLAN ON
6 THE PART OF DIRECTV TO STOP INFRINGING, DO WE FILE ANOTHER
7 ACTION AND THEN COME BACK IN 12 MONTHS AND TRY THAT, AND THEN
8 WHEN THAT'S OVER WE FILE ANOTHER ACTION? WE CONTINUE DOING
9 THAT THROUGH 2012. THAT'S THE VERY PERPETUAL LITIGATION
10 PROBLEM THAT JUSTICE STOREY -- AND WE'VE ATTACHED HIS
11 COMMENTARIES, NOTES -- ENCOURAGES THE AWARD OF AN INJUNCTION IN
12 THE FIRST PLACE.

13 YOUR HONOR, WHAT I WOULD SUGGEST WE DO IS ENTER
14 THE INJUNCTION. LET'S NOT TRY TO SIMULATE WHAT THE MARKET IS
15 GOING TO DO. LET'S LET THESE FACTORS PLAY OUT. DIRECTV HAS
16 CHOSEN TO BUILD THEIR SYSTEM ON INFRINGING TECHNOLOGY. THEY
17 CANNOT BE HEARD TO COMPLAIN WHEN THEY'RE ASKED TO STOP DOING
18 THAT. LET'S LET THESE FACTORS PLAY OUT. MY SUGGESTION IS
19 THIS: LET'S DO WHAT JUSTICE -- JUDGE EASTERBROOK DID IN THE
20 MAHURKAR CASE. HE SAID: I'M GOING TO ENTER THE INJUNCTION;
21 I'M NOT GOING TO STAY THE INJUNCTION; BUT I AM GOING TO GIVE
22 YOU ENOUGH TIME TO SEEK STAY BY THE FEDERAL CIRCUIT.

23 WE ARE REALLY TREADING IN NEW GROUND HERE. THE
24 DISTRICT COURTS ARE GOING TO BE LOOKING FOR SOME GUIDANCE FROM
25 THE FEDERAL CIRCUIT. WHY DON'T WE ENTER THE INJUNCTION, LET

1 THEM SEEK A STAY FROM THE FEDERAL CIRCUIT. THAT WILL GIVE THE
2 FEDERAL CIRCUIT AN OPPORTUNITY IMMEDIATELY TO REACT TO WHAT THE
3 SUPREME COURT HAS DONE AND PROCEED ON THAT BASIS.

4 THE COURT: WHAT'S SO DIFFICULT ABOUT WHAT THE
5 SUPREME COURT HAS DONE IN TERMS OF EBAY AND JUST SAYING THAT
6 THE PROPER ANALYSIS OF AN INJUNCTION ARE THE FACTORS THAT,
7 JUDGES, YOU'VE ALWAYS USED; AND LAWYERS, YOU'VE ALWAYS ARGUED.
8 I MEAN, I -- WHAT IS SO -- I MEAN, AS YOU JUST POINTED OUT,
9 THAT'S NOT ANYTHING NEW. THE SUPREME COURT SAID ISN'T ANYTHING
10 NEW, JUST REMINDING EVERYBODY TO STOP WANDERING OFF THE PATH,
11 GET BACK TO WHERE -- HOW WE'VE ALWAYS DONE INJUNCTIONS.

12 MR. ROBERTS: WELL, IN THE PAST IN PATENT CASES
13 IS THAT IN THE VAST MAJORITY OF CASES AN INJUNCTION WILL ISSUE.

14 THE COURT: RIGHT. BUT THAT AGAIN -- WHAT THE
15 SUPREME COURT WAS REMINDING THE FEDERAL CIRCUIT AND ALL OF THE
16 JUDGES DEALING WITH PATENTS IS THAT STOP GOING OFF ON SOME
17 SEPARATE ANALYSIS, USE THE STANDARD INJUNCTION ANALYSIS, AND
18 YOU JUST SEEM TO INDICATE THAT -- YOU START OFF YOUR ARGUMENT
19 BY SAYING THIS IS NOT ANYTHING NEW, AND YOU'RE ENDING UP YOUR
20 ARGUMENT SAYING, YEAH, THIS IS -- WE NEED TO GET NEW GUIDANCE
21 FROM THE FED CIRCUIT AND THE SUPREME COURT ON WHAT TO DO WITH
22 THIS NEW IDEA. WHAT'S NEW ABOUT THE STANDARD FACTORS SET OUT
23 IN EBAY.

24 MR. ROBERTS: WHAT I'M CONCERNED ABOUT BEING NEW
25 IS THAT IF COURTS START DENYING INJUNCTIONS, THEN WE GET INTO

1 THESE PROBLEMS THAT WE HAVEN'T FACED BEFORE IS: HOW DO WE
2 VALUE -- HOW DO WE VALUE THE INJUNCTION? IF WE'RE GOING TO
3 SUBSTITUTE A MONETARY REMEDY FOR THE INJUNCTION, HOW DO WE
4 VALUE THAT? WE SEE IN JUDGE DAVIS'S --

5 THE COURT: HOW IS THAT DIFFERENT THAN ALMOST
6 ANY MAJOR COMMERCIAL COMPLICATED INJUNCTION CASE? WE'VE BEEN
7 DOING THAT FOR 200 YEARS. I MEAN, YOU'RE ACTING LIKE IT'S --
8 SHOW ME HOW IT'S DIFFERENT THAN THE SAME QUESTION YOU DEAL WITH
9 WHEN YOU SUDDENLY -- I THINK THE EXAMPLE IN THE SEMINARS IS
10 ALWAYS THE GUY COMES TO YOUR OFFICE, IT'S ALWAYS 5:00 O'CLOCK
11 ON FRIDAY, AND THEY'RE GETTING READY TO CLEAR CUT ALL OF HIS
12 LAND, AND HOW ARE YOU GOING TO HANDLE THIS? THIS IS ACTUALLY
13 THE OPENING OF A BAR JOURNAL ARTICLE. AND YOU'VE GOT THAT SAME
14 THING, INJUNCTION, IRREPARABLE HARM, SO ON AND SO FORTH. HOW
15 IS THIS DIFFERENT?

16 MR. ROBERTS: WELL, IF YOU LOOK AT THE PAGE OF
17 HISTORY THAT THE SUPREME COURT REFERS TO IN PATENT CASES, YOU
18 CAN SEE THAT WHAT IS -- WHAT IS TRADITIONALLY DONE -- AND I
19 THINK IT IS A RESULT OF THE FOUR-PRONG INQUIRY. WHAT IS
20 TRADITIONALLY DONE IS THE INJUNCTION IS ENTERED. AND THAT'S
21 HOW THEY GET AROUND THESE PROBLEMS. AND SO WHERE THERE'S A
22 DIFFICULTY IN VALUING THE INJUNCTION, THE ANSWER IS NOT TO
23 VALUE THE INJUNCTION, BUT TO ENTER THE INJUNCTION. SO THE
24 ARGUMENT REALLY IS WHERE THERE'S THOSE KINDS OF PROBLEMS THAT
25 EXIST, THE ANSWER IS TO ENTER THE INJUNCTION, NOT TO GET OFF ON

1 SOME ANALYSIS ON HOW WE'RE GOING TO VALUE THIS BECAUSE IT IS
2 THE VERY DIFFICULTY OF THAT ANALYSIS THAT ENCOURAGES THE ENTRY
3 OF THE INJUNCTION IN THE FIRST PLACE. AND THAT'S WHY IN THE
4 ONLY CASES WHERE INJUNCTIONS SHOULD BE DENIED ARE CASES WHERE
5 THERE IS A VERY ESTABLISHED ROYALTY FOR THE PATENT, AND IT'S
6 EASY TO VALUE. AND THIS IS NOT ONE OF THOSE CASES
7 UNFORTUNATELY.

8 THE COURT: SO WE TAKE SEVEN CITIZENS OFF THE
9 STREET WITH MAYBE A COUPLE OF THEM HAVING A COLLEGE EDUCATION,
10 TELL THEM TO FIGURE OUT ON THE BASIS OF THE FANTASY WORLD, AS
11 SOME LAWYERS IN THIS COURT CALLED IT, WHAT THE REASONABLE
12 ROYALTY SHOULD BE. BUT A JUDGE WHO HAS BEEN WORKING THROUGH
13 THIS FOR ALMOST A YEAR, READ ALL THE TEXT, HOPEFULLY HAD SOME
14 EXPERIENCE, AND IN THE COURT OF APPEALS WITH A VAST NUMBER
15 OF -- I MEAN, THEY'VE GOT STAFF ATTORNEYS AND ENDLESS
16 EXPERIENCE -- CAN'T DO IT?

17 MR. ROBERTS: WELL, LET ME PUT THIS A DIFFERENT
18 WAY. THE PROBLEM IS THIS. THE PATENT CONFERRED THE RIGHT TO
19 EXCLUDE, AND WHAT IS THAT RIGHT FOR US? IF THAT RIGHT IS HELD
20 BY A COMPETITOR OF DIRECTV, WHAT WOULD THAT BE WORTH TO THEM?
21 TO BE ABLE TO SHUT DOWN DIRECTV. IF THAT'S WHAT THIS PATENT
22 DOES, IF IT SHUTS DOWN DIRECTV, WOULDN'T THAT RIGHT BE WORTH
23 MILLIONS AND MILLIONS AND MILLIONS OF DOLLARS TO A COMPETITOR?
24 WHAT I'M SAYING IS WE STILL HAVE THE ABILITY TO TAKE THIS
25 PATENT TO A COMPETITOR, GIVE THEM AN EXCLUSIVE LICENSE,

1 TRANSFER THAT RIGHT TO EXCLUDE OVER TO THEM, EITHER THROUGH A
2 TRANSFER OF TITLE, OR THROUGH A LICENSE, AND LET THEM EXERCISE
3 THAT. SO THE PROBLEM BECOMES HOW DO WE VALUE THE VIOLATION OF
4 THAT RIGHT? IF WE'RE GOING TO SUBSTITUTE A MONETARY AWARD FOR
5 THE INJUNCTION, HOW DO WE -- HOW DO WE VALUE THAT? IF WE GO TO
6 DIRECTV'S COMPETITOR AND SAY: WHAT IS IT WORTH TO YOU? IT'S
7 WORTH MILLIONS AND MILLIONS. HOW DO WE -- HOW DO WE ASK A
8 JURY? HOW DO WE ASK A JUDGE? HOW DO WE ASK A COURT OF APPEALS
9 TO VALUE THAT? AND THAT'S WHY IN THE MAHURKAR CASE, IT SAYS:
10 JUDICIAL GUESSTIMATES DO NOT CUT IT. YOU'VE GOT TO LET THE
11 MARKET MAKE THAT VALUE DETERMINATION. AND THAT'S WHY ON EBAY,
12 WHEN THE JURY AWARDED 23 MILLION, THE PARTIES EVENTUALLY SOLD
13 FOR 612.5 MILLION. WHO WOULD HAVE THOUGHT THAT THE RIGHT TO
14 EXCLUDE IN THAT CASE WAS WORTH OVER \$600 MILLION?

15 AND THAT'S THE PROBLEM WE'RE DEALING WITH. YOU
16 SAY, OKAY, THE JURY CAME BACK WITH 79 MILLION, BUT WHAT IS THE
17 RIGHT TO EXCLUDE GOING FORWARD WORTH? IS IT 612.5? IS IT
18 MORE? HOW DO WE -- WE ARE NOT IN A POSITION TO MAKE THAT
19 DETERMINATION. AND THAT IS THE VERY PROBLEM THAT WE'RE FACED
20 WITH AND WHY THE INJUNCTION SHOULD ISSUE IN THE FIRST PLACE
21 BECAUSE COURTS ARE NOT IN A POSITION TO SIMULATE THE MARKET ON
22 THIS POINT.

23 THE PUBLIC INTEREST PRONG IS ONE WHEREIN PATENT
24 CASES -- THE ONLY CASES I COULD FIND WHERE THEY FOUND THAT
25 PUBLIC INTEREST ON THE PART OF THE DEFENDANT OVERWEIGHS THE

1 RIGHT TO AN INJUNCTION OR WHETHER THERE IS A CRITICAL PUBLIC
2 INTEREST. WE QUOTE THE HYDROTECH CASE, 849 F.2ND AT 15 --
3 EXCUSE ME, AT 1458. THERE -- THIS WAS A PRELIMINARY INJUNCTION
4 CASE -- PRELIMINARY INJUNCTION WAS DENIED TO PRODUCTS NOT
5 HAVING TO DO WITH A CRITICAL PUBLIC INTEREST. IN OTHER WORDS,
6 THE INJUNCTION WAS NOT ALLOWED AS TO CANCER AND HEPATITIS KITS,
7 BUT IT WAS ALLOWED FOR PREGNANCY KITS. SO THAT'S A SITUATION
8 WHERE -- YOU KNOW, THERE IS A PUBLIC INTEREST, THEY BUILT A
9 BUSINESS ON THIS, BUT THEY SAID WHERE THERE'S A CRITICAL PUBLIC
10 INTEREST WE'RE NOT GOING TO ALLOW THE INJUNCTION. IF YOU LOOK
11 AT THE WIND SURFING CASE, THE COURT MAKES IT CLEAR THAT -- THAT
12 WHEN YOU -- WHEN YOU BUILD YOUR ENTIRE BUSINESS ON
13 INFRINGEMENT, THAT YOU ARE NOT GOING TO BE HEARD IN A COURT OF
14 EQUITY WHEN YOU SAY, WELL, TO ENJOIN ME FROM MY INFRINGING
15 ACTIVITIES IS TO HURT MY BUSINESS. THAT'S JUST NOT A FACTOR TO
16 BE CONSIDERED BY THE COURTS OF EQUITY.

17 SO IT SEEMS THAT IN THIS CASE ALL OF THE FACTORS
18 ARE IN DIRECTV'S FAVOR -- EXCUSE ME -- FINISAR'S FAVOR, AND
19 THERE IS NO REASON NOT TO ENTER AN INJUNCTION. AND AGAIN,
20 WE'RE VERY MUCH DISTINGUISHABLE FROM THE APPROACH JUDGE DAVIS
21 IS TAKING IN THAT THERE -- IT'S ALMOST A DE FACTO INJUNCTION
22 WHERE MICROSOFT HAS AGREED TO TAKE THIS OFF THE MARKET. HERE
23 WE'VE GOT UNTIL 2012 BEFORE THIS PATENT EXPIRES. AND WHAT IS
24 OUR REMEDY FOR DOING THAT? FILING CASE AFTER CASE, IT'S JUST A
25 PROCEDURAL NIGHTMARE. IT'S THE TYPE OF PERPETUAL LITIGATION

1 THAT WE SHOULDN'T HAVE TO GO THROUGH. AND THAT'S WHY AN
2 INJUNCTION SHOULD BE ENTERED IN THIS CASE.

3 IF THE COURT HAS NO FURTHER QUESTIONS ON THAT,
4 I'LL MOVE OVER TO THE ATTORNEY'S FEES ISSUE.

5 THE COURT: OKAY.

6 MR. ROBERTS: OF COURSE, THE PRIMARY BASIS THAT
7 WE'RE ASKING FOR ATTORNEY'S FEES IN THIS CASE IS THE JURY'S
8 UNANIMOUS FINDING OF WILLFUL INFRINGEMENT. THE CASES ARE CLEAR
9 THAT WILLFULNESS ALONE IS SUFFICIENT TO FIND EXCEPTIONALITY AND
10 TO AWARD ATTORNEY'S FEES. AND I SUPPOSE WE COULD CITE THE
11 COURT A HUNDRED CASES THAT STAND FOR THAT. THERE'S ALSO
12 INSTANCES OF LITIGATION MISCONDUCT THAT WE'VE CITED TO IN OUR
13 BRIEF. THE COURT IS FAMILIAR WITH THOSE HAVING BEEN PARTY TO
14 ALL OF THOSE MOTIONS AND HEARINGS. THE HIGHLIGHTS OF THAT ARE
15 THAT WE FILED -- I THINK, BY OUR COUNT 19 PAPERS HAD TO BE
16 FILED. AND I KNOW -- I DON'T MEAN MOTIONS, BUT I DO MEAN
17 PAPERS, AND WE USE THAT TERM INTENTIONALLY. NINETEEN PAPERS
18 HAD TO BE FILED BECAUSE OF BASIC RULE VIOLATIONS, AND DIRECTV
19 NOTES IN THEIR BRIEF, YOU KNOW, SOME OF THAT IS TO BE EXPECTED.
20 I ACKNOWLEDGE THAT SOME OF THAT IS TO BE EXPECTED. BUT IN THIS
21 CASE IT WAS AN EXTRAORDINARY AMOUNT OF PROBLEMS THAT WE
22 ENCOUNTERED. EVERY TIME WE TURNED AROUND, WE HAD TO FILE
23 ANOTHER MOTION BECAUSE WE'RE SEEING NEW THINGS BEING POSTED ON
24 US THAT HADN'T BEEN PROPERLY DISCLOSED PURSUANT TO THE LOCAL
25 RULES, THE OBLIGATION TO DISCLOSURE. THOSE ISSUES WERE ARGUED

1 IN NO LESS THAN SIX HEARINGS, AND THE COURT WAS A PARTY TO
2 THOSE. I WON'T DWELL ON THOSE.

3 DIRECTV ARGUES THAT THEY'RE, IN FACT, THE
4 PREVAILING PARTY IN THIS LITIGATION. I CAN GIVE YOU 79 MILLION
5 REASONS WHY THEY'RE NOT THE PREVAILING PARTY, BUT I WOULD
6 INSTEAD CITE TO THE BECKMAN INSTRUMENTS CASE AT 892 F.2ND AT
7 1553. WHERE THE COURT SAID: WHEN INFRINGEMENT IS FOUND TO BE
8 WILLFUL, THE POLICY BEHIND SECTION 285 OF DISCOURAGING
9 INFRINGEMENT MIGHT JUSTIFY IMPOSING ALL OF THE PATENT OWNER'S
10 ATTORNEY'S FEES ON THE INFRINGER EVEN IF THE INFRINGER
11 PREVAILED AS TO SOME OF THE CLAIMS IN SUIT. SO EVEN THOUGH
12 SOME OF OUR CLAIMS WERE HELD INVALID ON EARLY SUMMARY
13 JUDGMENTS, WHEREIN THIS CASE INFRINGEMENT WAS WILLFUL, AN AWARD
14 OF ATTORNEY FEES IS JUSTIFIED, AND WE WOULD ASK FOR SUCH.

15 ON ENHANCEMENT, AGAIN WE'VE OUTLINED ALL OF THE
16 FACTORS SET FORTH IN READ V. PORTEC. I DON'T WANT TO GO OVER
17 THE BRIEF AGAIN, BUT I WOULD NOTE THAT HERE WE HAVE A SITUATION
18 WHERE THE JURY AWARD IN COMPARISON TO DIRECTV'S ABILITY TO PAY
19 IS VERY SMALL. I WOULD -- I WOULD DARE SAY THAT THE AWARD
20 DOESN'T EVEN SHOW UP AS A BLIP ON THEIR FINANCIAL RADAR SCREEN.
21 TO ENHANCE THAT BECAUSE PART OF THE POLICIES TO BE ENFORCED ARE
22 TO BE PROMOTED BY ENHANCING THE AWARD ARE TO DETER
23 INFRINGEMENTS. AND BECAUSE THIS WAS FOUND TO BE WILLFUL, THE
24 ONLY WAY TO DO THAT IS TO TREBLE DAMAGES IN THIS CASE. WE'VE
25 GOT A SITUATION WHERE THEY CLAIM: WELL, WE ACTED IN GOOD

1 FAITH. WE'VE GOT AN OPINION FROM COUNSEL. BUT WHAT, IN FACT,
2 WE SAW WHEN THE EVIDENCE CAME OUT IS THAT THE OPINION THEY GOT
3 WAS RECEIVED BY IN-HOUSE COUNSEL AND PUT IN A DRAWER. HE SAYS
4 HE REVIEWED IT. HE SAYS HE MADE THE DECISION ON IT, BUT IF IT
5 WAS SOMETHING OF THIS MAGNITUDE, WOULDN'T THERE AT LEAST BE A
6 MEETING ABOUT THAT OPINION? WOULDN'T THERE AT LEAST BE SOME
7 INDICATION OF THE COMPANY RELYING ON THAT OPINION? IT'S ONE
8 THING TO GET AN OPINION. FIRST OF ALL, THE OPINION THEY GOT WE
9 SAW EVIDENCE THAT IT WAS BASED ON INCOMPLETE INFORMATION,
10 INCOMPLETE TECHNICAL INFORMATION. SO WHEN THE OPINION CAME IN,
11 WAS AN ENGINEER ASKED TO REVIEW THAT? NO. NO. MR. ARCENEAUX
12 TESTIFIED THAT HE NEVER REVIEWED IT UNTIL HE WAS PREPARING FOR
13 HIS DEPOSITION IN THIS CASE. NO TECHNICAL PERSON EVER REVIEWED
14 THAT OPINION TO EVEN SEE IF IT WAS ACCURATE IN SPITE OF THE
15 FACT THAT THE OPINION ITSELF SAID: WE ASK YOU TO CONFIRM THE
16 ACCURACY OF THIS TECHNICAL INFORMATION. LET US KNOW IF IT'S
17 NOT RIGHT SO THAT WE CAN AMEND THAT IF WE NEED TO.

18 SO WE'VE GOT A SITUATION WHERE THE OPINION IS
19 OBTAINED. IT LOOKS LIKE THEY'RE CROSSING THEIR T'S AND DOTTING
20 THEIR I'S, BUT WHEN IT COMES IN, IT GETS PUT IN A DRAWER. NO
21 MEETING WAS HELD TO DISCUSS IT. WHERE IS THE CORPORATE
22 RELIANCE ON THAT OPINION? IT'S ONE THING TO GET THE OPINION,
23 BUT YOU NEED TO HAVE A BUSINESS DECISION RELYING ON THAT
24 OPINION TO AVOID THE KIND OF PROBLEM THAT WE'RE FACING HERE
25 TODAY.

1 AND THAT IN ADDITION TO THE OTHER FACTORS ON
2 ENHANCEMENT ARE WHY THE JUDGMENT SHOULD BE TREBLED IN THIS
3 CASE. AND AGAIN, I NOTE THAT EVEN TREBLING THE JUDGMENT IS
4 GOING TO BARELY SHOW UP ON DIRECTV'S RADAR SCREEN.

5 WE HAVE WITH US TODAY A MR. BRIAN NAPPER, WHO IS
6 OUR DAMAGES EXPERT. I DON'T KNOW IF IT WOULD BE APPROPRIATE AT
7 THIS TIME TO PUT HIM ON THE STAND AND TO TALK ABOUT SOME OF
8 THESE ISSUES. I GUESS SOME OF THIS DEPENDS ON WHERE THE COURT
9 IS INCLINED TO GO. MR. NAPPER IS PREPARED TO TALK ABOUT THE
10 DIFFICULTY IN EVALUATING THE INJUNCTION, ADDITIONAL INFORMATION
11 THAT WOULD BE NEEDED TO PERFORM THAT VALUATION. HE'S NOT HERE
12 PREPARED TO GIVE A NUMBER BECAUSE OF THE DIFFICULTY OF THAT AND
13 COMPLEXITY OF THAT ANALYSIS. SO, I GUESS IT DEPENDS ON WHERE
14 THE COURT IS INCLINED TO GO. IF YOU WANT TO GET INTO THE
15 DETAILS OF THAT, WE WOULD BE HAPPY TO PUT HIM ON, OR WE CAN
16 MOVE RIGHT INTO THE PREJUDGMENT AND POSTJUDGMENT INTEREST.

17 THE COURT: OKAY. POSTJUDGMENT INTEREST IS
18 ESTABLISHED BY STATUTE. I DIDN'T EVEN SEE IN THE BRIEFS THERE
19 WAS MUCH DISCUSSION OR CONTROVERSY ON THAT. THERE'S A STATUTE
20 ON THAT. IS THERE SOMETHING I MISSED?

21 MR. ROBERTS: NO. I THINK YOU'RE RIGHT.

22 THE COURT: OKAY. PREJUDGMENT INTEREST, BOTH
23 SIDES HAVE AGREED THAT THE TEXAS STATUTORY SCHEME OF SIX
24 PERCENT IS PROPER. YOUR CALCULATION WAS ON THE .14 PERCENT OF
25 THE ROYALTY FEE BASIS, AND THEIRS WAS BASED ON THE \$1.32 PER

1 SET TOP BOX BASIS. BUT TAKING A LOOK AT YOUR CHARTS, IT COMES
2 OUT LIKE, WHAT, WITHIN A MILLION DOLLARS OF EACH OTHER?

3 MR. ROBERTS: SOMEHOW WE STILL MANAGED TO BE
4 \$700,000 APART.

5 THE COURT: YEAH. IT WAS FAIRLY CLOSE ON THAT.
6 SO, YOU MIGHT TOUCH BRIEFLY ON THAT, BUT YOU'RE PRETTY DARN
7 CLOSE, BOTH OF YOU THERE. AND SINCE YOU'RE AGREEING ON THE SIX
8 PERCENT, YOU'RE AGREEING ON THE STATUTORY SCHEME, YOU'RE
9 AGREEING ON THE MONTHS, YOUR DIFFERENCES ARE FAIRLY MINOR. YOU
10 WANT TO MAYBE HIGHLIGHT THOSE. BUT IF YOU'VE GOT A WITNESS TO
11 BE TALKING ABOUT, AS I MENTIONED BEFORE, EITHER THE INJUNCTION
12 OR HOW ONE WOULD CALCULATE A COMPULSORY LICENSE, THIS IS YOUR
13 OPPORTUNITY TO GET THAT ON THE RECORD.

14 MR. VEDERKA: OKAY. YOUR HONOR, WITH RESPECT TO
15 THE PREJUDGMENT INTEREST --

16 THE COURT: AND JUST FOR THE RECORD, SINCE WE
17 HAVE A DIFFERENT COURT REPORTER -- CHRIS IS ON VACATION --
18 PLEASE GO AHEAD AND IDENTIFY EACH SPEAKER AS YOU STAND UP. I
19 KNOW YOU'VE ALL GIVEN YOUR NAMES, BUT I WANT TO BE VERY SURE
20 SHE HAS THAT FOR THE RECORD.

21 MR. VEDERKA: C. J. VEDERKA ON BEHALF OF
22 FINISAR. THAT'S SPELLED V-E-D-E-R-K-A. THE ISSUE ON
23 PREJUDGMENT INTEREST IS TWO-FOLD, AND I CAN ADDRESS IT VERY
24 QUICKLY. YOU'RE CORRECT THAT WE'VE AGREED ON THE TEXAS
25 STATUTORY RATE WHICH IS SIX PERCENT. DIRECTV CONTENDS THAT

1 INTEREST SHOULD NOT BE COMPOUNDED, THAT IT SHOULD BE SIMPLE
2 INTEREST. FINISAR ASKS THAT THE COURT COMPOUND INTEREST
3 ANNUALLY. WITH RESPECT TO THE ANNUAL COMPOUNDING, WE JUST
4 BELIEVE THAT MORE CLOSELY RELATES TO THE COMMERCIAL REALITIES
5 THAT FINISAR WOULD FACE WHETHER WITH RESPECT TO LENDING OR
6 BORROWING MONEY. I -- I CHALLENGE ANYONE IN THE ROOM TO FIND A
7 BANK THAT WILL LOAN THEM MONEY WITHOUT COMPOUNDING INTEREST.
8 AND THE PURPOSE OF THE COURT'S DISCRETION TO AWARD PREJUDGMENT
9 INTEREST IS TO PUT THE -- PUT THE AGGRIEVED PARTY IN A POSITION
10 THAT MOST CLOSELY TRACKS WHERE HE WOULD HAVE BEEN IF THEY
11 HADN'T BEEN OUT THE MONEY THAT'S GOING TO BE AWARDED. SO WE
12 WOULD URGE THAT THE COURT COMPOUND THE PREJUDGMENT INTEREST
13 ANNUALLY. THAT'S A CONSERVATIVE APPROACH.

14 I WOULD LIKE TO DIRECT THE COURT'S ATTENTION TO
15 ONE CASE. THAT IS -- IT'S ACTUALLY THE BECKMAN CASE THAT WAS
16 SPOKEN TO EARLIER WHEN IT WAS ON REMAND. THE COURT IN THAT
17 CASE COMPOUNDED THE PREJUDGMENT INTEREST ANNUALLY, AND WITH
18 RESPECT TO ATTORNEY'S FEES UNDER SECTION 285 COMPOUNDED THOSE
19 AT TEN PERCENT ANNUAL RATE QUARTERLY. YOU COULD, IN YOUR
20 DISCRETION, COMPOUND THE INTEREST DAILY. AND SO IT'S OUR
21 POSITION THAT COMPOUNDING ANNUALLY IS A CONSERVATIVE APPROACH,
22 AND WE'D ASK THE COURT TO ADOPT THAT.

23 WITH RESPECT TO THE OTHER DEPARTURE BETWEEN THE
24 TWO PARTIES' CALCULATIONS, ONE IS THAT OUR CALCULATION OF
25 INTEREST WHILE COMPOUNDED YEARLY TALLIES THE MONEY ON A DAILY

1 BASIS. DIRECTV IS TALLYING THE MONEY ON WHAT IS CALLED A
2 MID-MONTH CONVENTION. WE BELIEVE THAT OUR CALCULATION MORE
3 APPROPRIATELY TRACKS HOW DIRECTV'S BUSINESS WORKS. I THINK
4 THAT THE COURT CAN TAKE JUDICIAL NOTICE THAT DIRECTV DOESN'T
5 GET ITS PAYMENTS FROM 15 MILLION SUBSCRIBERS ALL IN ONE DAY
6 EVERY MONTH, AND THAT THEY PROBABLY PAY THEIR MONEY EVERY --
7 YOU KNOW, PAYMENTS COME IN EVERY DAY, WHICH IS WHY WE ADDED THE
8 MONEY EVERY DAY. WE HAVEN'T COMPOUNDED THE INTEREST EVERY DAY,
9 BUT DIRECTV IS TAKING ONE MONTH -- ONE DAY IN A MONTH AND
10 TAKING AN AVERAGE BETWEEN THE TWO TIMES. AND MR. NAPPER'S
11 GROUP IS THE ONE THAT HAS CALCULATED THAT INTEREST FOR US AND
12 COULDN'T --

13 THE COURT: BUT IN TERMS OF -- AS YOU TALKED
14 ABOUT -- THIS WAS A COMMERCIAL BUSINESS OR LICENSE AND MAYBE
15 THERE'S SOME EVIDENCE FOR THIS, FOR EXAMPLE, ON THEIR IMPEG
16 LICENSE OR ONE OF THE OTHERS, IT WOULD SEEM UNLIKELY THAT
17 THEY'RE MAKING PAYMENTS EVERY DAY OR CALCULATING EVERY DAY. I
18 MEAN, NORMALLY IT WOULD BE ON A MONTHLY OR BIWEEKLY BASIS OR
19 SOMETHING LIKE THAT. AND FOR THAT MATTER, WHEN YOU START TALK
20 ABOUT DOING IT DAILY, ARE YOU DOING IT THE DAY THAT THE
21 CUSTOMER SENT THE CHECK? ARE YOU DOING IT THE DAY THE CHECK
22 CLEARED OR THE DAY THEY SIGNED THE AGREEMENT? I MEAN, WHAT --

23 MR. ROBERTS: WE'RE JUST MAKING THE POINT THAT,
24 YOU KNOW, AT LEAST IN DIRECTV'S BUSINESS, IN THE OPERATION OF
25 THEIR BUSINESS, THEY RECEIVE MONEY EVERY DAY.

1 THE COURT: WELL, YEAH.

2 MR. ROBERTS: AND SO IT WAS OUR POSITION THAT
3 THAT MORE CLOSELY TRACKED HOW -- THE COMMERCIAL REALITIES OF
4 DIRECTV.

5 THE COURT: BUT AREN'T WE TALKING ABOUT MAKING
6 YOUR CLIENT WHOLE? IN OTHER WORDS, THE LOSS THAT THEY WOULD
7 HAVE -- AND NORMALLY THEY WOULD BE GETTING A CHECK MONTHLY,
8 MAYBE EVEN LESS FREQUENTLY THEN, I'M NOT SURE. BUT PROBABLY NO
9 MORE THAN MONTHLY. AND THAT WOULD BE THEIR LOST OPPORTUNITY
10 COSTS. THEY COULD HAVE -- IF THEY HAD THAT MONEY IN HAND AT
11 THE BEGINNING OF EACH MONTH OR BEGINNING OF EACH TWO WEEKS,
12 THEY COULD PRESUMABLY HAVE EITHER INVESTED IT IN SOME GOOD
13 OPPORTUNITY OR TAKEN A LOW RISK INVESTMENT OF A TREASURY BILL
14 FOR LESS OR SOMETHING IN BETWEEN. THAT'S WHAT THE SIX PERCENT
15 WINDS UP STATUTORILY IT BEING KIND OF A COMPROMISE. I JUST --
16 I GUESS I'M NOT SURE -- THE POLICY ISSUE IS TO COMPENSATE YOU
17 FOR LOST OPPORTUNITY COST, AND YOU'RE GOING TO -- HOW THEY GET
18 THE MONEY IN AS OPPOSED TO HOW YOU WOULD NORMALLY GET IT.

19 MR. VEDERKA: RIGHT. AND FINISAR IS IN THE
20 BUSINESS OF PART OF ITS BUSINESS IS LICENSING ITS INTELLECTUAL
21 PROPERTY, GETS MONEY IN. THIS IS FROM FINISAR'S STANDPOINT AND
22 AT DIFFERENT TIMES. AND WE THOUGHT THAT THAT MORE CLOSELY
23 APPROXIMATED THE COMMERCIAL REALITIES OF THE PARTIES.

24 THE COURT: DO YOU HAVE ANY EVIDENCE THAT
25 FINISAR LICENSES ARE GETTING DAILY CHECKS FROM SOMEBODY, OR ARE

1 THEY NORMALLY --

2 MR. VEDERKA: I DON'T THINK --

3 THE COURT: I IMAGINE A BUSINESS DOING THAT, AND
4 SURELY THEY'RE SENDING THEM EVERY TWO WEEKS, EVERY MONTH OR
5 SOMETHING.

6 MR. VEDERKA: WELL, I -- AGAIN, WE DIDN'T ADDUCE
7 ANY EVIDENCE ON EXACTLY WHEN.

8 THE COURT: OKAY.

9 MR. VEDERKA: BUT THAT IS PART OF THE DIFFERENCE
10 IN THE METHODOLOGY AND IN TERMS OF THE DETAILS. WHEN
11 MR. NAPPER PRESENTS SOME OTHER TESTIMONY, WE COULD ASK HIM
12 ABOUT THAT.

13 THE COURT: OKAY.

14 MR. VEDERKA: WE'D LIKE TO CALL MR. BRIAN
15 NAPPER.

16 THE COURT: VERY GOOD.

17 (THE WITNESS IS SWORN IN.)

18 MR. VEDERKA: YOUR HONOR, I THINK WE JUST HAVE
19 THREE SLIDES WE MIGHT USE WITH MR. NAPPER. COULD I APPROACH
20 AND BRING A COPY OF THOSE?

21 THE COURT: PLEASE.

22 BRIAN NAPPER,

23 HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

24 D I R E C T E X A M I N A T I O N

25 BY MR. VEDERKA:

1 Q. GOOD MORNING, MR. NAPPER.
2 A. GOOD MORNING, MR. VEDERKA.
3 Q. AT TRIAL YOU TESTIFIED CONCERNING YOUR CALCULATIONS FOR
4 PAST DAMAGES; IS THAT CORRECT?
5 A. THAT'S CORRECT.
6 Q. AND YOU UNDERSTAND THAT PART OF WHAT WE'RE DOING TODAY IS
7 CONSIDERING IMPOSITION OF DAMAGES GOING FORWARD IN LIEU OF
8 INJUNCTION, IF ULTIMATELY JUDGE CLARK DETERMINES THAT AN
9 INJUNCTION IS NOT APPROPRIATE?
10 A. THAT'S MY UNDERSTANDING THAT THE COURT IS CONSIDERING
11 ALTERNATIVE OPTIONS, YES.
12 Q. AND IN YOUR OPINION IN MAKING SUCH CALCULATION, WOULD YOU
13 CONSIDER DIFFERENT INFORMATION THAN YOU CONSIDERED IN
14 DETERMINING PAST DAMAGES?
15 A. YES, ABSOLUTELY. THE TYPES OF INFORMATION -- LET'S TAKE A
16 STEP BACK. THE CONSTRUCT OF THE 1995 DAMAGES OPINION ARE BOTH
17 DIRECTV'S DAMAGES EXPERT, AS WELL AS MYSELF, IS A HYPOTHETICAL
18 NEGOTIATION BACK IN 1995. AND WHAT THAT DOES IS ROLLS --
19 ESSENTIALLY ESTABLISHES A ROYALTY RATE TO BE PAID PLACING
20 VARIOUS WEIGHTS ON INFORMATION THAT ARE IN OR AROUND THE TIME
21 OF THE HYPOTHETICAL NEGOTIATION. AND THEN AS TIME ELAPSES YOU
22 PLACE ESSENTIALLY ALL OTHER THINGS BEING EQUAL LESS WEIGHT AS
23 INFORMATION IS FURTHER OUT INTO THE PROJECTED PERIOD OF TIME.
24 SO IN THIS CASE, AS I DID, YOU PLACE LESS WEIGHT ON
25 INFORMATION, FOR EXAMPLE, 2000, THE YEAR 2000 FORWARD, 2001,

1 2002, 2003. AND ESSENTIALLY IN COMING UP WITH AN APPROPRIATE
2 ROYALTY RATE, IT'S APPLIED AGAINST THE ROYALTY BASE. IN MY
3 CASE I BELIEVE IT'S FINISAR'S REVENUE OF DIRECTV BECAUSE OF THE
4 ASSISTED ASPECT OF THE PATENT. AND WHAT WE DO AND WHAT WE
5 PRESENTED TO THE JURY THEN IS APPLYING THAT RATE ON THE REVENUE
6 STREAM UP TO THE TIME OF TRIAL PRESUMING AN INJUNCTION WOULD BE
7 ISSUED BY THE COURT.

8 Q. OKAY. AND WOULD THAT VERY APPROACH CREATE A DIFFERING
9 RESULT, IN YOUR OPINION?

10 A. YES. ESSENTIALLY, WITHOUT THE PRESUMPTION OF AN
11 INJUNCTION, THEN IT ESSENTIALLY PUTS US IN A POSITION OF TODAY
12 FINISAR AND DIRECTV SITTING DOWN, AGAIN UNDER INFRINGEMENT
13 FOUND TO BE USING THE PATENT OF VALIDITY AND ENFORCEMENT, ET
14 CETERA. AND ESSENTIALLY ALSO WITH WILLFULNESS, BEING FOUND TO
15 BE WILLFULLY INFRINGING ON THE PATENT AND THESE TWO PARTIES NOW
16 SIT DOWN TODAY. AND IF I WERE ASKED TO REVIEW AND ANALYZE WHAT
17 THAT RESULT WOULD BE BASED UPON MY INFORMATION OR KNOWLEDGE OF
18 THE CASE, I BELIEVE THAT THERE WOULD BE OTHER INFORMATION THAT
19 I WOULD PLACE MORE WEIGHT ON THAN I DID ORIGINALLY.

20 Q. OKAY. WELL, YOU'VE PREPARED A SHORT LIST OF SOME OF THE
21 INFORMATION THAT YOU WOULD NEED TO CONSIDER.

22 MR. VEDERKA: CAN YOU PUT THAT UP ON THE SCREEN,
23 PLEASE, SUE?

24 Q. (BY MR. VEDERKA) ALL RIGHT. HERE IN THIS FIRST SLIDE,
25 YOU HAVE PRIMARY CHANGES FROM THE 1995 CONCEPT. WHAT DID YOU

1 INTEND TO IMPART BY THAT?

2 A. ESSENTIALLY WHAT I JUST SAID, WHICH IS AS WE SIT HERE NOW
3 IN JULY 2006 THE MARKETPLACE IS COMPLETELY DIFFERENT THAN THE
4 1995 HYPOTHETICAL NEGOTIATION BETWEEN FINISAR AND DIRECTV.

5 Q. AND I BELIEVE THAT YOU HAVE POINTED OUT SOME OF THESE
6 ESTABLISHED MARKET DATA POINTS, THE FIRST ONE BEING DIRECTV'S
7 MAJORITY MARKET SHARE. HOW DID THAT AFFECT --

8 THE COURT: YES?

9 MR. SAVIKAS: MAY I MAKE AN OBJECTION.

10 THE COURT: SURE.

11 MR. SAVIKAS: WE DID NOT SEE ANY OF THESE
12 DEMONSTRATIVES, AND I THOUGHT OUR EARLIER AGREEMENT WAS WE GET
13 THEM AT 9 O'CLOCK THE DAY BEFORE, SO THIS IS THE FIRST TIME
14 THAT WE'RE SEEING THEM.

15 MR. VEDERKA: THIS IS, YOU KNOW --

16 THE COURT: IF YOU MADE SUCH AN AGREEMENT, I
17 MEAN, I GUESS YOU HAVE TO LIVE WITH YOURSELF ETHICALLY. I'LL
18 LET YOU GO ON IF --

19 MR. VEDERKA: WELL, I THINK --

20 THE COURT: YOU CAN MAKE AGREEMENTS --

21 MR. VEDERKA: I MADE AN AGREEMENT WITH RESPECT
22 TO THAT DURING THE TRIAL. I HAD NOT CONSIDERED THIS HEARING TO
23 BE, YOU KNOW, A CONTINUATION OF TRIAL. I APOLOGIZE IF I'VE
24 BROKEN SOME AGREEMENT. I HAD NO PROBLEM -- THESE ARE NOT
25 VERY -- THESE ARE NOT CONTROVERSIAL SLIDES.

1 THE COURT: I'M GOING TO OVERRULE THE OBJECTION.

2 BUT -- BUT GO AHEAD.

3 MR. VEDERKA: OKAY. THANK YOU, YOUR HONOR.

4 Q. (BY MR. VEDERKA) WITH RESPECT TO THE FIRST DATA POINT YOU
5 HAVE, WHAT IMPACT WOULD THAT HAVE ON YOUR ANALYSIS?

6 A. WELL, ESSENTIALLY -- AND YOU CAN EVEN CATEGORIZE A NUMBER
7 OF THESE SITUATIONS WHERE THE MARKET IN 2006 IS DIFFERENT THAN
8 IN 1995. FOR THE DBS MARKETPLACE IN GENERAL AND DIRECTV'S
9 POSITIONING WITHIN THAT MARKETPLACE, AND THESE ARE JUST SOME OF
10 THE OBSERVATIONS, FACTS REALLY THAT AS DIRECTV SITS HERE TODAY
11 HAVING TO NEGOTIATE RIGHTS TO THE 505 PATENT, IT WOULD BE A
12 CERTAINTY NOW VERSUS BACK IN 1995 WHERE IT WAS CLEARLY LESS
13 THAN CERTAIN. FOR EXAMPLE, ON THE PREVIOUS SLIDE THE FACT THAT
14 THEY WERE A -- THEY ARE NOW A 56 PERCENT MARKET SHARE OWNER IN
15 A TWO-PLAYER MARKETPLACE. THAT'S THE FIRST POINT. THE
16 INSTALLED SUBSCRIBER BASE IS NOW 15 MILLION AND GROWING. AND
17 THEN ESSENTIALLY THE PRODUCT ASSESS THE CURRENT PROFITABILITY.
18 IF I RECALL SOME QUESTIONS AT TRIAL REGARDING CURRENT
19 PROFITABILITY, AND CERTAINLY THE REVENUES AND PROFITS OF
20 DIRECTV NOW IS WITH CERTAINTY A VERY PROFITABLE VENTURE BY
21 PRETTY MUCH ANY MEASURE YOU WANT TO APPLY TO IT.

22 Q. AND WITH RESPECT TO COMPETITION, THERE IS A DIFFERENCE
23 BETWEEN WHAT THE PARTIES PERCEIVED IN 1995 AND WHAT WE
24 UNDERSTAND NOW, CORRECT?

25 A. THAT IS CORRECT. THERE WAS -- WHILE THERE IS SOME

1 INDICATION THAT DIRECTV HAD A LITTLE BIT OF A FIRST MARKET
2 ADVANTAGE, THEY WERE VERY CONCERNED ABOUT OTHER COMPANIES THAT
3 WERE GETTING INTO THE DBS BASE, PRIMESTAR, ECHOSTAR CERTAINLY
4 AT THAT TIME AND OTHER COMPANIES, MAYBE THREE OR FOUR OTHERS.
5 ESSENTIALLY, AS WE -- SO ACTUALLY THE MARKETPLACE IN 1995. NOW
6 AS WE SIT HERE IN 2006, DIRECTV ONLY HAS ONE COMPETITOR, AND
7 THAT'S ECHOSTAR. AND SO THAT'S A DIFFERENT SITUATION NOW
8 PROVEN, IF YOU WILL, AS OPPOSED TO 1995 WHERE IT MIGHT BE AN
9 EVENTUALITY, BUT YOU HAVE TO TAKE INTO ACCOUNT THE RISK THAT
10 THAT'S GOING TO MATERIALIZE. AND THAT A CABLE IS STILL A
11 COMPETITOR TO THE DBS MARKETPLACE, BUT EVEN NOW TO LESSER
12 DEGREE THAN WHAT WAS ANTICIPATED BACK IN 1995.

13 Q. OKAY. COULD WE PROCEED --

14 THE COURT: HOLD ON A SECOND. SO TELL ME HOW
15 COST OF ENTRY ARE GOING TO FIGURE INTO THIS, THIS KIND OF
16 SATELLITE BUSINESS. YOU'VE ONLY GOT ONE OTHER COMPETITOR
17 BASICALLY. I GUESS A CLASS THAT MIGHT BE CALLED OLIGOPOLY.
18 YOU'VE GOT COST OF ENTRY INTO THE MARKET, NOT A CHANCE OF
19 TRYING TO SELL TO A BUNCH OF COMPETING BUYERS. YOU'VE --
20 ACCORDING TO YOU, WE'VE ONLY GOT ONE OTHER ONE OUT THERE AND
21 CABLE TO A LESSER DEGREE. AREN'T THERE BOTH FACTORS THERE THAT
22 WOULD TEND TO RAISE THE VALUE AND ALSO LOWER IT?

23 THE WITNESS: I WHOLEHEARTEDLY AGREE, YOUR
24 HONOR. I THINK IT'S AN EXCELLENT POINT. FOR EXAMPLE, IF YOU
25 GO BACK TO 1995, HAD AN AGREEMENT BEEN STRUCK WITH DIRECTV BACK

1 IN 1995 IN THE HYPOTHETICAL WORLD, ONE COULD CONCEIVE THE
2 ARGUMENT AS WELL THAT FINISAR WOULD HAVE HAD AN OPPORTUNITY TO
3 LICENSE TO PRIMESTAR, TO LICENSE TO THREE OR FOUR OTHER DBS
4 COMPANIES AT THAT POINT IN TIME WHOSE ROYALTIES ARE NOW
5 FOREGONE POTENTIALLY OR COLLAPSED INTO FINISAR'S OPPORTUNITY
6 WITH ECHOSTAR AND DIRECTV.

7 THE COURT: BUT NOW WE'RE TALKING
8 ABOUT -- LET'S LOOK AT TODAY.

9 THE WITNESS: SURE.

10 THE COURT: WE'VE ALREADY GOT WHAT THE JURY HAS
11 IN THE PAST. BUT RIGHT NOW YOU HAVE -- WHAT YOU'RE SAYING IS
12 DIRECTV WITH 56 PERCENT MARKET SHARE AND ONLY ONE COMPETITOR
13 AND JUST -- PARTLY I WANT TO GET THIS OUT FOR THE RECORD IS:
14 WHAT ARE THE COSTS OF ENTRY INTO THIS KIND OF BUSINESS?

15 THE WITNESS: I AGREE, YOUR HONOR, THAT IT IS A
16 FAIRLY SIGNIFICANT BARRIER TO ENTRY FOR OTHER COMPANIES AT THIS
17 POINT IN TIME.

18 THE COURT: IN TERMS OF BILLIONS, RIGHT? IT'S
19 UP THERE AND SO FORTH.

20 THE WITNESS: I WOULD SAY THAT IN TERMS OF
21 BILLIONS OR MORE, PERMITTING NECESSARY TO GET SATELLITES UP
22 THERE, THAT THERE ARE -- I WOULD BE -- I'D BE MORE SURPRISED
23 THAN NOT IF THERE'S A THIRD ENTRANT INTO THE DBS MARKETPLACE.
24 THE COMPETITION IS GOING TO COME FROM CABLE AS MUCH AS IT
25 POSSIBLY CAN.

1 THE COURT: ALL RIGHT, SO YOU DO HAVE THE
2 POSSIBILITY OF SELLING TO ECHOSTAR PERHAPS, AND THEN AS COUNSEL
3 HAS ARGUED THEY MIGHT HAVE THE ABILITY TO ELIMINATE DIRECTV,
4 BUT IS THAT REALISTIC IN TERMS OF THE CAPITAL REQUIREMENTS THAT
5 WOULD BE NEEDED TO TAKE OVER 15 MILLION CUSTOMERS. FOR
6 EXAMPLE, ARE THE SET TOP BOXES INTERCHANGEABLE, OR DOES
7 ECHOSTAR HAVE A DIFFERENT KIND?

8 THE WITNESS: THAT'S A GOOD QUESTION. I BELIEVE
9 THERE ARE SOME DIFFERENCES. MY IMPRESSION IS THAT THERE'S BEEN
10 SOME SORT OF CONVERGENCE IN THE MARKETPLACE, THAT THE SET TOP
11 BOX IS BECOMING MORE OF A COMMODITY BETWEEN THE TWO COMPANIES.
12 I STILL THINK THERE ARE SOME DIFFERENCES.

13 THE COURT: AND MAYBE WITH A DISH OR WHATEVER IS
14 BRINGING IN THE SIGNAL. THERE HAS TO BE SOME KIND OF
15 CONVERTERS, AS I RECALL ON THE DISH ITSELF COMING IN.

16 THE WITNESS: THAT'S CORRECT. I WOULD IMAGINE,
17 ALTHOUGH I'M NOT A TECHNICAL EXPERT, IT WOULDN'T SURPRISE ME
18 AGAIN THAT THERE IS SOME DIFFERENCES IN THE TECHNOLOGY. SO
19 YOUR POINT IS A GOOD ONE, YOUR HONOR, IN TERMS OF THE ABILITY
20 OF ECHOSTAR TO SERVICE IF YOUR POINT IS THAT \$15 MILLION -- 15
21 MILLION SUBSCRIBERS OF DIRECTV, I WOULD SAY THAT THERE WOULD
22 HAVE TO BE SOME INVESTMENT BY ECHOSTAR. CERTAINLY BY ECHOSTAR
23 VIS-A-VIS SOME OTHER NEW ENTRY INTO THE MARKETPLACE, ALTHOUGH I
24 WOULDN'T DISMISS THAT NECESSARILY, BUT --

25 THE COURT: AND YOU'D HAVE THE SAME KIND OF

1 BARRIERS OF ENTRY OR VARIOUS EXPANSION OF THE CABLE. WHEREAS
2 IN THE CITY, THEY PROBABLY HAVE THEIR CABLE NETWORKS OUT IN THE
3 AREAS WHERE, I GUESS, SATELLITE TV WAS INITIALLY POPULAR, IN
4 THE RURAL AREAS, THERE ARE MANY AREAS STILL NOT SERVED BY
5 CABLE, SO THERE THAT WOULD BE AT COST.

6 THE WITNESS: I WOULD AGREE THAT TO EXTEND TO
7 THOSE PARTICULAR RURAL AREAS WOULD BE SOME INVESTMENT, ALTHOUGH
8 OBVIOUSLY WITH ECHOSTAR THEY DO HAVE THEIR SATELLITES THERE TO
9 TRY --

10 THE COURT: I WAS TALKING ABOUT THE OTHER
11 COMPETITOR, CABLE.

12 THE WITNESS: I'M SORRY. THE CABLE CERTAINLY
13 WOULD STILL BE CHALLENGED WITH RESPECT TO RURAL, ALTHOUGH IT'S
14 MY UNDERSTANDING HAVING DONE SOME WORK FOR A COUPLE OF CABLE
15 COMPANIES IN THE ELECTRICAL PROPERTY BASIS, THAT THEY HAVE
16 VASTLY IMPROVED THEIR ABILITY TO REACH THE RURAL AREAS BECAUSE
17 THEY KNEW THAT THAT WAS A COMPETITIVE SHORTCOMING OF THEIRS.

18 THE COURT: OKAY. GO AHEAD.

19 MR. VEDERKA: OKAY. SUSAN, COULD WE PROCEED TO
20 THE NEXT SLIDE?

21 Q. (BY MR. VEDERKA) OKAY. AND WITH RESPECT TO ADDITIONAL
22 PRIMARY CHANGES FROM THE 1995 CONSTRUCT, YOU WOULD WANT TO
23 CONSIDER ADDITIONAL DIRECTV LICENSES?

24 A. YES. AS I -- THE COURT WOULD RECALL DIRECTV SIGNED AN
25 AGREEMENT WITH GEM STAR IN 2004, I BELIEVE, I TESTIFIED IN THE

1 1995 CONSTRUCT THAT GAVE A LITTLE BIT LESS WEIGHT TO THAT
2 BECAUSE OF THE LENGTH OF TIME BETWEEN 1995 AND 2004. I WOULD
3 PLACE MORE WEIGHT ON THAT AS WE SIT HERE IN 2006. A PRIMARY
4 TAKE AWAY IN ADDITION WITH THE TIVO AGREEMENT SIGNED IN 2002,
5 THE PRIMARY TAKE AWAY IS WITH CONSTRUCT. WHAT WOULD THE
6 ROYALTY STRUCTURE LOOK LIKE?

7 Q. AND WHAT WOULD THAT CONSTRUCT BE?

8 A. THE CONSTRUCT EVEN FURTHER CONFIRMED BY USING THESE TWO
9 AGREEMENTS IN ADDITION TO THE MACROVISION AGREEMENTS WHICH ARE
10 THE THREE SOLE AGREEMENTS THAT DIRECTV AS AN ENTITY ASSIGNED IS
11 ALL ON A PERCENTAGE OF REVENUE OR A PER SUBSCRIBER BASIS, NOT
12 ON HARDWARE, NO ON SET TOP BOXES.

13 Q. I BELIEVE THAT'S RELATED TO THE LAST POINT ON THE DIRECTV
14 NO LONGER HAS A CORPORATE RELATIONSHIP WITH A SET TOP BOX
15 MANUFACTURER?

16 A. IT'S MY UNDERSTANDING THAT THE HUGHES NETWORK SYSTEM,
17 WHICH WAS A SISTER COMPANY TO DIRECTV, WAS SOLD RECENTLY
18 2004-2005 TIME FRAME, I BELIEVE, TO THOMPSON, ANOTHER SET TOP
19 BOX MANUFACTURER, SO THAT DOES MAKE SENSE. SO DIRECTV HAS NO
20 RELATIONSHIP WHATSOEVER IN TERMS OF A CORPORATE RELATIONSHIP
21 WITH ANY SET TOP BOX MANUFACTURER.

22 Q. OKAY. AND I BELIEVE YOU'VE ALSO SAID THAT THERE WOULD BE
23 SOME ADDITIONAL OR UPDATED INFORMATION THAT YOU WOULD WANT TO
24 CONSIDER.

25 MR. VEDERKA: CAN WE PROCEED WITH THE NEXT

1 SLIDE, SUSAN?

2 Q. (BY MR. VEDERKA) AND HERE YOU'VE BROKEN THAT DOWN INTO
3 FINANCIAL AND I BELIEVE LICENSING.

4 A. YES, EXACTLY. THE TITLE INFORMATION NOT AVAILABLE AND
5 NEEDING UPDATE IS -- I'VE BROKEN INTO TWO BUCKETS, FINANCIAL
6 AND LICENSING. SO THE FINANCIAL, IT WOULD BE IMPORTANT, I
7 THINK, AGAIN FOR THE MARKET DYNAMICS TO WORK OUT WHAT WOULD BE
8 THE AGREEMENT BETWEEN DIRECTV AND FINISAR TODAY TO LOOK AT NOW
9 PROJECTION PREPARED TODAY FOR REVENUE OPERATING PROFIT BEFORE
10 DEPRECIATION AND AMORTIZATION, SERIALIZE THE PATENT 2012.

11 IF YOU RECALL IN THE 1995 CONSTRUCT WHILE THAT
12 WAS MENTIONED IN PASSING, LESS WEIGHT WAS PLACED ON THAT
13 INCLUDING BY THE COURT BECAUSE OF IT EXISTING SO FAR REMOVED
14 FROM THE 1995 HYPOTHETICAL NEGOTIATION.

15 IN ADDITION, THIRD PARTY ANALYST PROJECTIONS ARE
16 OFTEN USEFUL. WE RELIED UPON SOME BACK IN THE 1995 TIME FRAME.
17 CERTAINLY I'D LIKE TO SEE WHAT THE THIRD PARTY ANALYST ARE
18 PREDICTING FOR DIRECTV FOR THE LIFE OF THE PATENT, WHICH IS
19 ONLY ABOUT SIX YEARS TO RUN FROM TODAY THROUGH 2012.

20 Q. AND WHAT ARE -- WHAT ARE QUARTERLY EARNING COST?

21 A. ESSENTIALLY, I BELIEVE WE ASKED FOR THIS INFORMATION
22 PREVIOUSLY, BUT DIRECTV, SINCE THEY WEREN'T A PUBLIC ENTITY IN
23 1995 THROUGH 2003, DID NOT HAVE SUCH INFORMATION. THESE ARE
24 QUARTERLY EARNINGS CALLS FOR ANALYST WHERE DIRECTV IS
25 EXPLAINING ITS BUSINESS, PROJECTING WHERE IT THINKS ITS GROWTH

1 IS GOING TO BE, WHAT ARE ITS CHALLENGES, HOW IT'S GOING TO ADD
2 SUBSCRIBERS, ET CETERA. SO THOSE ARE OFTEN USEFUL INFORMATION
3 AS KIND OF MOUTH PIECES OF DIRECTV INDIVIDUALS TO THE
4 MARKETPLACE AS TO WHAT THEY'RE INTENDING TO DO, WHAT ARE THEIR
5 FUTURE PLANS, AND NOT BY BEING ENCOMPASSED IN THE CURRENT AND
6 PROJECTED GROWTH RATES FOR SUBSCRIBERS. I WOULD ALSO LOOK AT
7 DIRECTV'S CURRENT MARKET CAPITALIZATION, WHAT THE VALUE OF THE
8 MARKETPLACE PLACES ON THE DIRECTV CONTRASTING THAT WITH 1995
9 MARKET CAP, WHICH IS OBVIOUSLY SIGNIFICANTLY LESS. AND I'D
10 PROBABLY WANT TO GET AN UPDATE ON ACQUISITION COSTS PER
11 SUBSCRIBER UNDER THE AUSPICES OF ESSENTIALLY DIRECTV, IF THEY
12 LOSE SUBSCRIBERS BY ANY WAY, SHAPE OR FORM AS A RESULT OF 505
13 PATENT OR LACK OF ACCESS TO IT, HOW MUCH IT WOULD COST THEM TO
14 REACQUIRE THOSE SUBSCRIBERS.

15 Q. AND THE LAST POINT, THE NATURE OF EXISTING CONTRACTS?

16 A. AN IMPORTANT CONSIDERATION NOW AS OPPOSED TO BACK IN 1995,
17 LESS SO IN 1995, IS DIRECTV HAS LONG TERM NOW CONTRACTS, AS I
18 UNDERSTAND IT, WITH CONTENT OR COMPONENT PROVIDERS, CONTENT
19 BEING THE MEDIA COMPANIES STREAMING THEIR CONTENT THROUGH
20 DIRECTV'S SYSTEM TO THE HOME, AND ALSO THEY HAVE SOME COMPONENT
21 PROVIDERS MEANING PERHAPS SET TOP BOX MANUFACTURERS AND OTHER
22 HARDWARE. SO THE IMPACT TODAY OF AN INABILITY TO STREAM THEIR
23 CONTENT TO CONSUMERS MAY HAVE AN IMPACT ON THOSE CONTRACTS.
24 AND IT MAY BE DIFFERENT THAN IN 1995.

25 MR. VEDERKA: OKAY. LET'S PROCEED TO THE LAST

1 SLIDE, SUSAN, PLEASE.

2 Q. (BY MR. VEDERKA) AND HERE ARE --

3 THE COURT: WAIT A MINUTE. WAIT A MINUTE.

4 YOU'RE SAYING THE CONTRACTS -- TELL ME THIS AGAIN ABOUT HOW
5 THAT AFFECTS THEIR ABILITY TO STREAM CONTENT.

6 THE WITNESS: ESSENTIALLY, AS I UNDERSTAND IT,
7 YOUR HONOR -- AND PERHAPS I MISSPOKE -- IT'S THE EXISTING
8 CONTRACTS BETWEEN DIRECTV AND CONTENT, LET'S SAY IT'S DISNEY OR
9 SOME OTHER MEDIA COMPANY THAT'S SUPPLYING CONTENT THROUGH
10 DIRECTV, AND THEY HAVE A CONTRACT WITH DIRECTV. THE POINT IS
11 HERE IS THAT THOSE TYPES OF CONTRACTS MAY BE DIFFERENT IN 2006
12 THAN THE TERMS OR THE NUMBER OF THOSE CONTRACTS BACK IN 1995.
13 AND SO THE IMPACT OF THOSE CONTRACTS, HOW DOES THAT GET VALUED
14 NOT INTERRUPTING THOSE CONTRACTS IN TERMS OF A POTENTIAL
15 INJUNCTION OR A STOPPING OF SERVICE, I.E., DIRECTV NOT BEING
16 ABLE TO STREAM THAT CONTENT TO THE CONSUMERS, AND DOES THAT
17 HAVE AN IMPACT ON THE CONTRACTS IN PLACE OR ANY FUTURE
18 CONTRACTS THAT DIRECTV IS CURRENTLY NEGOTIATING.

19 THE COURT: OKAY.

20 Q. (BY MR. VEDERKA) AND FINALLY, INFORMATION THAT YOU WOULD
21 WANT TO EVALUATE IN TERMS OF LICENSING.

22 A. I TOUCHED ON THIS PREVIOUSLY. THERE ARE A SERIES OF TIVO
23 AGREEMENTS FROM, I THINK, 1999 TO 2002, INCLUDING SOME RECENT
24 AMENDMENTS, AND I'D WANT TO CONSIDER, AS I SIT HERE TODAY, THE
25 TIVO AGREEMENTS, LOOK AT THEM MORE CAREFULLY. THERE IS ONE

1 ASPECT OF THAT AGREEMENT, WHICH IS A BROADER RELATIONSHIP
2 GRANTED, THAT HAS TO DO WITH PATENT LICENSING AND TECHNOLOGY
3 LICENSING. AND I WOULD CONSIDER THAT, AS WE SIT HERE TODAY.
4 BACK IN 1995, I DID NOT CONSIDER IT. AND IF THERE'S ANY OTHER
5 RECENT DIRECTV AND/OR OTHER INDUSTRY AGREEMENTS THAT MIGHT HAVE
6 SOME RELEVANCE AGAIN AS WE SIT HERE IN 2006. SO THAT'S THE
7 TYPE OF INFORMATION I THINK WOULD BE APPROPRIATE TO CONSIDER,
8 ANALYZE, AND PLACE APPROPRIATE WEIGHT ON EITHER LESS WEIGHT OR
9 MORE WEIGHT IN DETERMINING WHAT A RATE MIGHT BE EVEN IN THEIR
10 COMPULSORY LICENSE BETWEEN FINISAR AND DIRECTV.

11 Q. OKAY. THANK YOU. NOW, WHEN YOU TESTIFIED AT TRIAL IN
12 CALCULATING PAST DAMAGES, YOU TESTIFIED IT WAS YOUR OPINION
13 THAT A PER SET TOP BOX ROYALTY METHODOLOGY WAS INAPPROPRIATE;
14 IS THAT RIGHT?

15 A. THAT'S CORRECT.

16 Q. WOULD THAT STILL BE YOUR OPINION WITH RESPECT TO DAMAGES
17 GOING FORWARD?

18 A. I THINK EVEN MORE SO TODAY GIVEN THAT THE JUMP START
19 AGREEMENT IN 2004 AND THE ONE PATENT OR TECHNOLOGY LICENSE
20 AGREEMENT BETWEEN TIVO AND DIRECTV IN 2002 CLEARLY INDICATES TO
21 ME BACK IN 1995 ONLY HAD ONE AGREEMENT THAT HAD BEEN SIGNED
22 WITH MACROVISION BETWEEN DIRECTV AND ANOTHER TECHNOLOGY OWNER.
23 HERE NOW I HAVE, IN ESSENCE, THREE AGREEMENTS, ALL OF WHICH ARE
24 BASED ON A RUNNING ROYALTY BASED UPON A PER SUBSCRIBER WHICH
25 CORRELATES TO REVENUE OR ON A REVENUE BASIS AND NOT ON A SET

1 TOP BOX. DIRECTV IS YET TO SIGN AN AGREEMENT TO PAY ON A SET
2 TOP BOX BASIS, AND EVEN FURTHER REMOVED FROM THAT, THEY'VE
3 ACTUALLY GOTTEN RID OF THEIR SET TOP BOX ENTITY WHICH WAS
4 HUGHES NETWORK SYSTEMS. THERE WAS NO REASON REALLY TO PAY ON
5 THE SET TOP BOX BASIS.

6 Q. SO, IN YOUR OPINION, BASED ON THE INFORMATION YOU DO HAVE,
7 THE RUNNING ROYALTY METHODOLOGY IS EVEN MORE APPROPRIATE THAN
8 IT WAS WITH RESPECT TO CALCULATION OF PAST DAMAGES?

9 A. I WOULD SAY THAT'S EVEN MORE -- MORE CONCRETE, THAT IT
10 WOULD BE MORE ON A RUNNING ROYALTY PERCENTAGE OF SALES BASIS;
11 YES, SIR.

12 MR. VEDERKA: THANK YOU, MR. NAPPER.

13 MR. ROBERTS: IF I COULD JUST OFFER SOME
14 CONCLUSIONARY REMARKS, YOUR HONOR.

15 THE COURT: WELL, I'M GOING TO ALLOW AN
16 OPPORTUNITY FOR SOME CROSS-EXAMINATION.

17 MR. ROBERTS: OH, THANK YOU.

18 THE COURT: MR. SAVIKAS.

19 C R O S S E X A M I N A T I O N

20 BY MR. SAVIKAS:

21 Q. GOOD MORNING, MR. NAPPER.

22 A. HI, MR. SAVIKAS, HOW ARE YOU?

23 Q. I'M WELL. THANK YOU.

24 ARE YOU AWARE OF ANY REPORTED CASE FROM THE
25 FEDERAL CIRCUIT IN WHICH HYPOTHETICAL NEGOTIATIONS WERE

1 CONSIDERED AFTER A JURY VERDICT?

2 A. AN INTERESTING QUESTION. I'M GOING THROUGH, I BELIEVE,
3 VIRTUALLY ALL OF THE CASES, WITH ONE EXCEPTION THAT I'VE BEEN
4 INVOLVED WITH WHERE THE PLAINTIFF HAS BEEN PREVAILED ON THE
5 ISSUES OF VALIDITY AND INFRINGEMENT, HAD AN INJUNCTION ISSUED.
6 SO THERE WOULD BE NO NEED FOR A HYPOTHETICAL -- HYPOTHETICAL
7 NEGOTIATION. IT WOULD BE MARKET DYNAMICS DICTATING WHAT
8 HAPPENS AFTER THAT POINT.

9 Q. SO YOU'RE NOT AWARE OF THE COURT EVER CONDUCTING
10 HYPOTHETICAL NEGOTIATIONS AFTER A JURY VERDICT?

11 A. AGAIN, IT'S ALWAYS BEEN AN INJUNCTION WITH ONE EXCEPTION.

12 Q. ARE YOU FAMILIAR WITH THE TERM "COMPULSORY LICENSE"?

13 A. GENERALLY, YES.

14 Q. ARE YOU FAMILIAR WITH THE COURTS IMPOSING A COMPULSORY
15 LICENSE AFTER A JURY VERDICT AND NOT GRANTING AN INJUNCTION?

16 A. I'M FAMILIAR WITH THAT. I DON'T BELIEVE IT'S BEEN ANY OF
17 THE PROJECTS I'VE WORKED ON HAS THAT OCCURRED. MY PRESUMPTION
18 IS -- AND MY KNOWLEDGE IS THAT IT'S PRIMARILY BECAUSE -- I'M
19 SORRY. THERE'S BEEN ONE CASE I'VE WORKED ON WITH ZENITH WHERE
20 THERE WAS 30 SOME ODD LICENSES, AND SO A COMPULSORY LICENSE WAS
21 GRANTED BY THE COURT BECAUSE THAT WAS AN ESTABLISHED ROYALTY
22 RATE. SO I'M NOT FAMILIAR -- I'M FAMILIAR WITH THAT CAN OCCUR
23 ON OCCASION.

24 Q. AND WHAT WAS THE COMPULSORY LICENSE RATE GRANTED IN THAT
25 CASE? DID YOU SAY IT WAS AN ESTABLISHED ROYALTY?